Zamri bin Othman v Mohamad Roiff bin Md Arib & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-24NCC-486–09 OF 2019
AHMAD FAIRUZ J
20 NOVEMBER 2020

Road Traffic — Insurance — Duty of insurers to satisfy third party claim — Whether a separate recovery action was required — Whether there was a duty to serve notice to third party claimant — Whether plaintiff could enforce judgment obtained in trial court — Road Transport Act 1987 s 96(3)

This was an application ('OS') by the plaintiff for declarations, inter alia, that the third defendant had no right to acquire any benefit from the order of Kuala Lumpur High Court dated 28 March 2014 ('the declaratory order') and for the said order to be declared null and void, and that the third defendant be ordered to pay the plaintiff the judgment sum obtained by the plaintiff at the Kota Bharu Magistrate Court on 22 May 2017. The facts leading to the filing of the action began with a motor vehicle road accident which took place on 16 May 2012 involving a motorcycle ridden by the plaintiff and another motorcycle ridden by the first defendant. The third defendant pleaded that it issued an insurance policy to cover the motorcycle ridden by the first defendant from 22 May 2011 to 21 May 2012 in the name of one Mahmud bin Dollah ('the deceased'). There were two magistrate's court suits instituted by the plaintiff in 2014 and 2016 respectively. The parties in both suits were the plaintiff, the first defendant and the deceased as the second defendant. It came to third defendant's knowledge that the insured, Mahmud bin Dollah died on 11 July 2000. This resulted in the third defendant obtaining the said declaratory order. It was never explained to this court what happened to the 2014 suit after third defendant discharged their solicitors from defending the insured person. The plaintiff in 2016 then refiled a suit against the same defendants, the judgment of which became the basis of this OS. Upon receiving a notice dated 19 July 2016 pursuant to s 96(2)(a) of the Road Transport Act 1987 ('the Act') from the plaintiff's solicitor, third defendant replied and notified the plaintiff on the existence of the declaratory order. The trial proceeded in the absence of the first and second defendants or their solicitors. The learned magistrate found the first and second defendants to be fully liable. Hence, the order dated 22 May 2017 was obtained from the lower court. The plaintiff contended that there was no notice given by the third defendant to them. Therefore, the proviso under s 96(3) of the Act was inoperable and the insurers could not escape from paying upon being demanded under the strength of the judgment obtained in the liability proceedings. The issue before the court was whether the plaintiff, a third party claimant, could enforce a judgment obtained from the trial court by

presenting the said judgment demanding the insurance company to pay the amounts stated in the judgment.

Held, dismissing the application with costs:

(1) The third defendant was entitled to embark on an action to repudiate its liability against the insured under the policy. It was very much an action between the insurer and the insured. From the facts of the case, there was a blatant act of fraud when the actual person who was insured had died months before the insurance was purchased. Until judgment was obtained against the insured, the third party claimant had yet to have a legal interest against the policy. Therefore, there was no legal duty to serve the declaratory papers on the plaintiff or upon his solicitors when the third defendant sought to obtain the declaratory order under s 96(3) of the Act. The declaratory order was after all, before the judgment was obtained (see paras 22–23 & 25).

(2) It would be unfair to allow the plaintiff to execute the judgment against the third defendant when the third defendant was not present to defend itself at the trial. At the recovery action, the third party claimant would be entitled to launch a claim against the insurers on the basis of the judgment obtained. The judgment sought to be enforced in the current case was a judgment obtained in default and not after a full trial. In addition, there was fraudulent conduct not known to third defendant which under normal circumstances, would nullify an insurance policy. As such, given the manner in which the judgment was obtained, the determination on the issue of liability could not be said to have been made by the learned magistrate (see paras 30–33).

(3) It was the court's view that the concept of *uberrimae fidei* was sacrosanct in respect of contracts for insurance. It was the minimum standard of adherence and legally obliging on all parties entering an insurance contract to act honestly and not mislead or withhold critical information from one another. It must be upheld and applied as a fundamental principle. In the current case, the facts showed that the insured had already died when the insurance was renewed. In short, the insurance was covering a dead man. The facts therefore were peppered with allegations of fraud (see paras 35 & 37).

(4) This court did not find the affirmation by solicitor of the plaintiff to be flawed as the test was whether the deponent of the affidavit as provided under O 41 of the Rules of Court 2012 had knowledge of what transpired Therefore, no consideration was given to the point and the preliminary objection was dismissed (see para 40).

[Bahasa Malaysia summary

Ini adalah permohonan ('SP') oleh plaintif untuk deklarasi, antara lain, bahawa defendan ketiga tidak mempunyai hak untuk menerima manfaat daripada perintah Mahkamah Tinggi Kuala Lumpur bertarikh 28 Mac 2014 ('perintah deklarasi') dan perintah deklarasi tersebut sebagai batal dan tidak sah, dan defendan ketiga diperintahkan membayar jumlah penghakiman yang diterima oleh plaintif di Mahkamah Majistret Kota Bharu pada 22 Mei 2017. Pemfailan tindakan tersebut akibat kemalangan jalan raya kenderaan bermotor yang berlaku pada 16 Mei 2012 yang melibatkan motosikal yang dibawa oleh plaintif dan satu lagi motosikal yang dibawa oleh defendan pertama. Defendan ketiga menghujahkan bahawa polisi insurans untuk melindungi motosikal yang dibawa oleh defendan pertama dari 22 Mei 2011 hingga 21 Mei 2012 dikeluarkan atas nama Mahmud bin Dollah ('si mati'). Terdapat dua saman mahkamah majistret yang difailkan oleh plaintif masing-masing pada 2014 dan 2016. Pihak-pihak dalam kedua-dua saman tersebut adalah plaintif, defendan pertama dan si mati sebagai defendan kedua. Hal ini berdasarkan pengetahuan defendan ketiga bahawa pihak yang diinsuranskan, Mahmud bin Dollah meninggal dunia pada 11 Julai 2000. Hal ini menyebabkan defendan ketiga memohon perintah deklarasi tersebut. Tidak pernah dijelaskan kepada mahkamah ini perkara yang berlaku di dalam saman 2014 selepas defendan ketiga tidak menggunakan khidmat peguam mereka daripada membela orang yang diinsuranskan. Plaintif pada tahun 2016 kemudian memfailkan semula saman terhadap defendan yang sama, penghakiman yang menjadi asas SP ini. Setelah menerima notis bertarikh 19 Julai 2016 menurut s 96(2)(a) Akta Pengangkutan Jalan 1987 ('Akta tersebut') daripada peguam plaintif, defendan ketiga memaklumkan plaintif mengenai kewujudan perintah deklarasi tersebut. Perbicaraan diteruskan tanpa kehadiran defendan pertama dan kedua atau peguam mereka. Majistret terpelajar mendapati defendan pertama dan kedua bertanggungjawab sepenuhnya. Oleh itu, perintah bertarikh 22 Mei 2017 tersebut diterima dari mahkamah rendah. Plaintif berhujah bahawa tiada notis yang diberikan oleh defendan ketiga kepada mereka. Oleh itu, proviso di bawah s 96(3) Akta tersebut tidak terpakai dan penanggung insurans tidak dapat mengelak daripada membayar apabila penghakiman yang diperolehi dalam prosiding liabiliti dikuatkuasakan. Isu di hadapan mahkamah adalah sama ada plaintif, pihak ketiga yang menuntut, boleh menguatkuasakan penghakiman yang diterima dari mahkamah perbicaraan dengan menguatkuasa penghakiman tersebut yang menuntut syarikat insurans membayar jumlah yang dinyatakan dalam penghakiman tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Defendan ketiga berhak untuk memulakan tindakan untuk menolak liabilitinya terhadap pihak yang diinsuranskan di bawah polisi. Tindakan ini merupakan tindakan antara penanggung insurans dan pihak yang diinsuranskan. Dari fakta kes, terdapat perbuatan frod secara

terang-terangan yang mana orang sebenar yang diinsuranskan telah meninggal dunia beberapa bulan sebelum insurans dibeli. Selagi penghakiman belum diberikan terhadap pihak yang diinsuranskan, pihak ketiga yang menuntut masih belum mempunyai kepentingan undang-undang terhadap polisi tersebut. Oleh itu, tiada kewajipan undang-undang untuk menyampaikan perintah deklarasi ke atas plaintif atau kepada peguamnya apabila defendan ketiga memfailkan tindakan deklarasi di bawah s 96(3) Akta tersebut. Perintah deklarasi adalah selepas penghakiman diberikan (lihat perenggan 22–23 & 25).

(2) Adalah tidak adil untuk membenarkan plaintif melaksanakan penghakiman terhadap defendan ketiga apabila defendan ketiga tidak hadir untuk membela diri pada perbicaraan. Pada tindakan perlaksanaan, pihak ketiga berhak untuk memfailkan tuntutan terhadap penanggung insurans berdasarkan penghakiman yang diperolehi. Penghakiman yang ingin dikuatkuasakan di dalam kes ini adalah penghakiman ingkar dan bukan selepas perbicaraan penuh. Di samping itu, terdapat perbuatan frod yang tidak diketahui oleh defendan ketiga yang dalam keadaan biasa, yang boleh membatalkan polisi insurans. Oleh itu, berdasarkan penghakiman ingkar tersebut, penentuan mengenai isu liabiliti tidak ditentukan oleh majistret terpelajar (lihat perenggan 30–33).

(3) Mahkamah ini berpendapat bahawa konsep *uberrimae fidei* adalah penting berkenaan kontrak insurans. Adalah menjadi undang-undang mantap bahawa semua pihak yang memasuki kontrak insurans hendaklah bersikap jujur dan tidak mengelirukan atau menyembunyikan maklumat penting. Hal ini merupakan prinsip asas. Di dalam kes ini, fakta-fakta menunjukkan bahawa orang yang diinsuranskan telah meninggal dunia apabila insurans diperbaharui. Pendek kata, insurans tersebut melindungi seorang lelaki yang sudah mati. Oleh itu, fakta kes menunjukkan terdapatnya unsur frod (lihat perenggan 35 & 37).

(4) Mahkamah ini tidak mendapati bahawa pengesahan afidavit oleh peguamcara plaintif adalah defektif kerana A 41 Kaedah-Kaedah Mahkamah 2012 membolehkan pengesahan tersebut berdasarkan pengetahuan tentang perkara yang disebut di dalam afidavit. Oleh itu, bantahan awal telah ditolak (lihat perenggan 40).]

Cases referred to

Am General Insurance Bhd v Iskandar bin Mohd Nuli [2016] 1 MLJ 818, CA (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 4 MLJ 541; [2011] 5 CLJ 866, CA (folld)

Mohd Izzuddin Syukri bin Ishak v Pacific & Orient Co Berhad & Anor [2019] MLJU 1649, HC (refd)

Muhammad Zaihasri bin Hassan v Pacific & Orient Insurance Co Berhad [2018] 8 MLJ 739, HC (refd)
Pacific & Orient Insurance Bhd v Rasip bin Hamsudi (disabled/coma suing through next friend and legal parents Hamsudi bin Nin'ada and Sunaya bt Asbam) & Ors [2018] 8 MLJ 802; [2017] 4 CLJ 572, CA (distd)
Pacific & Orient Insurance Co Berhad v Kumari Nadason and Anor [2015] MLJU 2163, CA (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as an intervener) [2015] 10 MLJ 532, HC (folld)
Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd [2018] 5 MLJ 204, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan [2003] 4 MLRH 816; [2003] 1 LNS 280, HC (refd)

Legislation referred to

Road Transport Act 1987 s 96, 96(1), (2)(a), (3), Part IV
Rules of Court 2012 O 41

Adrian Thambyrajah (Saleha Tahir & Partners) for the plaintiff.
Kamalanathan Ratnam (Vinod Kamalanathan & Assoc) for the third defendant.

Ahmad Fairuz J:

INTRODUCTION

[1] This is the plaintiff's application, by way of an originating summons ('OS'), for declarations, inter alia:

(a) pursuant to s 96(3) of the Road Transport Act 1987 ('the Act') that the third defendant ('P&O') has no right to acquire any benefit from the Order of Kuala Lumpur High Court Originating Summons No WA-24NCVC-255–02 of 2014 dated 28 March 2014 ('the declaratory order') and that the said order be declared null and void and not binding on the plaintiff; and

(b) that pursuant to s 96(1) of the Act, P&O as the insurer of motorcycle No DAC 6720 on 16 May 2012 be ordered to pay the plaintiff named herein the judgment sum obtained by the plaintiff at the Kota Bharu Magistrate Court on 22 May 2017 vide case No DA-A73KJ-626–10 of 2016 against the rider of motorcycle No DAC 6720.

[2] After hearing parties, this court dismissed the OS with costs. The

following are the grounds of decision of this court.

BACKGROUND FACTS

[3] The facts leading to the filing of this action began with a motor-vehicle road accident which took place on 16 May 2012 involving a motorcycle ridden by the plaintiff and another motorcycle ridden by the first defendant. P&O pleaded that it issued an insurance policy to cover the motorcycle ridden by the first defendant from 22 May 2011 to 21 May 2012 in the name of one Mahmud bin Dollah ('the deceased').

[4] From the facts presented before this court, it can be deduced that there are two magistrate's court suits instituted by the plaintiff in 2014 and 2016 respectively. The parties in both suits were the plaintiff, the first defendant and the deceased as the second defendant.

[5] It came to P&O's knowledge that the insured, Mahmud bin Dollah died on 11 July 2000. This resulted in P&O obtaining the said declaratory order. It was never explained to this court on what happened to the 2014 suit after P&O discharged their solicitors from defending the insured person.

[6] The plaintiff in 2016 then refiled a suit against the same defendants, the judgment of which became the basis of this OS. Upon receiving a notice dated 19 July 2016 pursuant to s 96(2)(a) of the Act from the plaintiff's solicitor, P&O replied and notified the plaintiff on the existence of the declaratory order. The trial proceeded in the absence of the first and second defendants or their solicitors. The learned magistrate found the first and second defendants to be fully liable. Hence, the order dated 22 May 2017 was obtained from the lower court.

PARTIES' CONTENTION

[7] The plaintiff's contention is that there was no notice given by P&O to them. The case of the plaintiff was therefore simple. The proviso under s 96(3) of the Act was therefore inoperable. The insurers cannot escape from paying upon being demanded under the strength of the judgment obtained in the liability proceedings.

[8] Relying on the decisions of the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 ('Muniammah') and *Pacific & Orient Insurance Bhd v Rasip bin Hamsudi (disabled/coma suing through next friend and legal parents Hamsudi bin Nin'ada and Sunaya bt Asbam) & Ors* [2018] 8 MLJ 802; [2017] 4 CLJ 572 ('Rasip'), it was contended that once a judgment had been obtained by a third

party against the insured, there is no need for recovery proceedings to be filed as the third party is entitled to the judgment sum by a mere presentation of the said judgment on the insurer.

[9] P&O in resisting the claim, argued that it was not as straight forward as the plaintiff to merely 'demand payment upon presenting the judgment'. As the insurer was not a party to the liability trial, for all intent and purposes, it was not able to defend itself. More so in this particular case, the judgment was obtained by default.

[10] It was contended that at the time of the action at the magistrate's court where the liability action was taken, an insurer who repudiated liability was not obliged to continue defending its case at the lability trial as it will invite the notion that the insurer *had waived the right to deny policy liability.* Until the decision of the Court of Appeal in *Am General Insurance Bhd v Iskandar bin Mohd Nuli* [2016] 1 MLJ 818 in December 2015 (and which was subsequently affirmed by the Federal Court), there was no authority for the proposition that an insurer may validly reserve its position regarding policy liability in such a case. It was only after the decision of *Iskandar Mohd Nuli* that the principle of commonality of interest was introduced and it was open for insurers to continue defending their position at the liability trial. Therefore, P&O's absence at the liability trial court was not due to their failure to represent themselves but instead due to a considered legal position taken by them. They therefore, cannot be faulted.

ANALYSIS AND FINDINGS OF THIS COURT

[11] The issue before this court is plainly whether the plaintiff, a third party claimant can enforce a judgment obtained from the trial court by presenting the said judgment demanding the insurance company to pay the amounts stated in the judgment

[12] The plaintiff argued that he was entitled to enforce the judgment based on the decision of the Court of Appeal in *Rasip*.

[13] P&O argued that the plaintiff is not entitled to demand the judgment sums by a mere presentation of the judgment on them. It was contended that the approach taken by the plaintiff was erroneous as reliance on *Rasip* was flawed. The way to enforce the said judgment is by way of a recovery action against the insurance company. It is a separate claim to be made by way of a writ action. The foundation of the claim is under s 96(1) of the Act. P&O also argued that by virtue of the declaratory order, it no longer was obliged to the plaintiff as it had repudiated liability.

[14] By repudiating liability, in effect it means that the insurance company declares to the world at large that they will not be responsible for any claims made by a third party claimant who obtained the judgment at the liability trial in the Magistrates' Court. The challenge to the insurance company in claiming this route is the language of the s 96(1) and (3) and the scheme of the Act itself in particular under Part IV.

The third party right to be paid the judgment sum

[15] Central to this case is the interpretation of s 96 of the Act itself. In essence, under s 96(1), a third party claimant with a judgment ts entitled to require the insurer to 'pay the persons entitled to the benefit of the judgment any sum payable in respect of the liability'. For ease of reference s 96 is reproduced below:

> 96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks
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> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, *then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.*
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> (2) No sum shall be payable by an insurer under subsection (1) —
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> (a) in respect of anyjudgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;
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> (b) in respect of any judgement, so long as execution is stayed pending an appeal; or
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> (c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —
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> (i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;
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> (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the

person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection(1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

The insurer's right to not pay the judgment sum

[16] The only way for the insurer to avoid paying such a demand, is if he had obtained a declaration from a court that the insurance was void or unenforceable. The qualifier to this being the need for the insurer to notify the third party claimant that it intends to obtain the said declaration on or within seven days of commencement of the declaration proceedings.

[17] Counsel for P&O contended that: (i) there was no duty to serve notice on to the third party claimant; (ii) the third party claimant is to embark on a separate recovery action in order to be entitled to the sums under the judgment; and (iii) the repudiation was based on the occurrence of fraud hence, the proper mode for any recovery action to be made must be via Writ and not originating summons.

No duty to serve notice to the third party claimant

[18] This is the crux of the issue. As contended by the plaintiff, there must be notice given to the third party before obtaining a declaration under s 96(3). Conversely, it was contended by counsel for P&O that there is no requirement to give the notice or even if there was a failure of the third party to attend the proceedings, the declaration obtained would still be valid.

[19] It was submitted by counsel for P&O that this court should take guidance from the decision of *Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as an intervener)* [2015] 10 MLJ 532 ('Azhar').

The said decision was upheld by the Court of Appeal and leave to the Federal Court was refused. It stands for the proposition that a third party claimant's legal interest to intervene only comes into existence if and when the third party Claimant has obtained judgment against the insured.

[20] John O' Hara J (as he then was) at the High Court reasoned as follows:

> [27] Now s 96(1) has to be read with s 96(3) and the proviso thereto. Section 96(3) specifically provides the procedure for the insurers to move the court against its insured to obtain and applied for declaration. This court reads s 96(3) as specifically spelling out that the insurers need to obtain a declaration from a court that the insurance was void or unenforceable. In considering s 96(3) this court construes the words 'before the date the liability was incurred' in s 96(3) to mean liability incurred as a result of a judgment handed down by a court of competent jurisdiction and not liability incurred as a result of the accident in question because the latter is vague and uncertain especially in regards to contribution (if any) and quantum. Moreover it would be an intolerable burden to place upon the insurer (and other insurers) to obtain the declaration before the accident occurred if the court were to accept the intended intervener's construction that liability is incurred at the time of the accident. As such this court find that it is constrained to differ from the interpretation of the learned judge in *Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675; [2013] 1 LNS 40, in regard to the phrase 'before the date the liability was incurred'.
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> [28] *Therefore this court's interpretation is that the intended intervener's legal interest to intervene only comes into existence if and when he has obtained judgment against the insured after which date if the insurer intends to apply to declare the policy void and unenforceable against the insured, the insurer would also have to serve all the cause papers on the intended intervenor. Once the intended intervenor had obtained judgment against the insured, he therefore would then have a legal right to intervene as he could then claim a legal interest in the insurers application for a declaration (as regards legal interest see Kumarasamy Pillai Govindaraju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundaram all Sambantham Mudaliar & Anor (Vegadachalam a/l Palaniappen, intervener)* [2010] 4 MLJ 567 *and Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52).
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> [29] *In this instant case the declaratory order dated 14 May 2013 was obtained before the conclusion of the civil suit in Sungai Petani Sessions Court Civil Action No 53 954 08 of 2011 and therefore there was no obligation on the part of the insurer to serve the cause papers relating to a matter between the insured and the insurer upon the intended intervenor. Furthermore it's the court's decision that the intended intervenor had not yet derived a legal interest that would entitle him to intervene as the matter is purely between the insurer and the insured.*
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> [30] *As the declaratory order of 14 May 2013 merely declares the insurer's rights and cannot be used to enforce its right, it was therefore necessary for the insurer to obtain the order so as to declare its rights against the insured. This reinforces the courts view that encl 3 is purely a matter between the insurer and the insured and therefore this court ought not to entertain the intended intervener's application in encl 7.* Therefore it is the court's finding that if and when the intended intervenor did obtain judgment

against the insured it could then proceed to recover the judgment it had obtain by the recovery action against the insurer by virtue of s 96(1). With the declaratory order, the insurer could seek reimbursement from the insured of the judgment sum as and when it is paid to the intended intervenor. (Emphasis added.)

[21] In *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204, the Court of Appeal dismissed the appellant's appeal and laid down the principle that once the decision of the High Court had been upheld by the Federal Court, a Court of Appeal has no jurisdiction to review, set aside or overrule the decision of the High Court as the High Court's decision has become the decision of the Federal Court. The apex court held:

The High Court was right to refuse the respondent's application to amend the trial court's sealed order. The COA acted out of jurisdiction when it allowed the trial's court order as affirmed by the Federal Court to be re-opened. The trial court's order was no longer an order of a court lower in hierarchy to the Court of Appeal. *For, once affirmed by the highest court, the trial judge's order demanded the respect and obedience of all parties and even all courts*. (Emphasis added.)

[22] This court is in agreement with the contention of counsel for P&O. P&O was entitled to embark on an action to repudiate its liability against the insured under the policy. It was very much an action between the insurer and the insured.

[23] P&O was entitled to act immediately to repudiate any liability that may arise. From the facts of the case, there was a blatant act of fraud when the actual person who was insured had died months before the insurance was purchased.

[24] Notwithstanding the argument by the plaintiff counsel that *Azhar* was a case that involves an application to interverse, the principle of whether the third party claimant had any legal interest vis a vis the insurance contract is key. This court is inclined to agree with the decision in *Azhar,* which has backing of the apex courts.

[25] Until judgment was obtained against the insured, the third party claimant has yet to have a legal interest against the policy. Therefore, there was no legal duty to serve the declaratory papers on the plaintiff or upon his solicitors when P&O sought to obtain the declaratory order under s 96(3) of the Act. The declaratory order was after all, before the judgment was obtained.

[26] The issue was whether such an approach was repugnant of the law. Counsel for P&O submitted that it was not. He referred to *Pacific & Orient Insurance Co Berhad v Kumari Nadason and Anor* [2015] MLJU 2163, where the Court of Appeal held that the declaration that the insurance was unenforceable only binds the insured under the policy holder but does not bind

the third party claimant. Zaharah JCA (then CJM) held that 'the insurer was not entitled to the benefit of the declaratory order as against the applicant (third party claimant) and therefore the applicant's application was academic'. A similar position was also taken in *Muhammad Zaihasri bin Hassan v Pacific & Orient Insurance Co Berhad* [2018] 8 MLJ 739 ('Zaihasri').

[27] This court does not take exception to the two decisions. It simply translates to mean that the third party claimant may still pursue against the insurer for recovery of the judgment sum. However, it has to be via a separate recovery action. Not by presenting the judgment as in the current case.

[28] The facts in this case too, are peculiar and distinguishable to the cases where the insurer was a party at the liability trial as was the case in *Rasip* where the insurers were at the liability court and defended itself (see also *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947). In those cases, it was not unreasonable to expect that all challenges to be taken during the liability trial itself and no separate recovery action was required as the insurers were present throughout the trial. This is different to the facts and circumstances in the current case.

A separate recovery action to enforce the liability judgment

[29] The proposition that a separate recovery action should be taken by a third party claimant was expounded in the decision of the Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866 ('Letchumanan'). The court held:

> (3) The liability and recovery actions were distinct from each other. The former was founded on tort, to determine negligence; the latter was based on a statutory right under the RTA which included the construction of the terms of the insurance policy and the application of s 91 and s 96 of the RTA. For this reason alone it was unjust to bar the respondent from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue in the recovery action (see paras 20 & 21).
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> (4) *The respondent was not a party in the liability action. Thus a final determination of the issue of liability could not be said to have been made by the trial judge in the liability action* (see para 22).
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> (5) A dogmatic approach in applying the res judicata principle as a bar would be unjust to the respondent who did not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata could be binding on the parties. It was founded on justice and common sense (see para 22).
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> (6) What was raised by the respondent with regard to the construction of the insurance policy was not decided on its merits in the liability action. Being a live issue in the recovery action, the doctrine of res judicata should not apply (see para 57). (Emphasis added.)

[30] This court agrees with the principles laid down in *Letchumanan*. It would be unfair to allow the plaintiff to execute the judgement against P&O when P&O was not present to defend itself at the trial. At the recovery action, the third party claimant will be entitled to launch a claim against the insurers on the basis of the judgment obtained.

[31] What was even more compelling is the fact that the judgment sought to be enforced in the current case is a judgment obtained in default and not after a full trial. Although a judgment in default is as good as a judgment after a full trial, barring any irregularities, it is enforceable. But that is not the issue.

[32] The issue is simply whether the plaintiff can demand for payment against P&O by merely presenting the said judgment in light of the declaration obtained bv the latter to repudiate any liability against the insured. In addition, there was fraudulent conduct not known to P&O which under normal circumstances, would nullify an insurance policy.

[33] As such, given the manner in which the judgment was obtained, the determination on the issue of liability could not be said to have been made by the learned magistrate.

Whether an originating summons is the correct mode

[34] The position in law is trite that when any allegation of fraud is being raised, it requires lengthy argument and mature consideration at trial (see *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1). It should not be resolved by way of exchange of affidavits.

[35] It is this court's view that the concept of *uberrimae fidei* is sacrosanct in respect of contracts for insurance. It is the minimum standard of adherence and legally obliging on all parties entering an insurance contract to act honestly and not mislead or withhold critical information from one another. It must be upheld and applied as a fundamental principle.

[36] An insurer agrees to insure on the basis that all information presented to it in the proposal form is true. If the information is untrue and the insurer is induced into accepting the proposal put forward by the insured, the entire arrangement is tainted with fraud. An insurer cannot be accountable for a contract that was fraudulently entered into.

[37] In the current case, the facts showed that the insured had already died when the insurance was renewed. In short, the insurance was covering a dead man. The facts therefore are peppered with allegations of fraud.

[38] In *Zaihasri*, the learned High Court judge had to deal with a similar situation. In arriving at the conclusion that the fraud must be dealt with at a trial separate from the declaration suit, Azizul J held as follows:

> [37] Of course, fraud is not a matter that is capable of being determined merely based on affidavit evidence. In the present case, although the primary relief claimed is declaratory in nature, the applicant also sought for an order for the insurer to pay to the applicant the judgment sum together with interests and costs obtained at the liability proceedings.
>
> [38] *It would be iniquitous for this court to direct that payment be made by the insurer in satisfaction of the judgment in default without the issue offraud having been heard and determined on its merits*. It will be recalled that the insurer contended that the accident had never happened, based on a sworn statutory declaration of the insured, Aznil. If this is indeed true, it follows that the applicant here must have been complicit in, or somehow privy to, the fraud. T*o require the insurer to pay the judgment sum without having first determined the contention of fraud on its merits would in my view be to permit the provisions of a statute to be used as an instrument of fraud, which is a matter that this court would not countenance*. (Emphasis added.)

[39] Similarly, the High Court in *Mohd Izzuddin Syukri bin Ishak v Pacific & Orient Co Berhad & Anor* [2019] MLJU 1649 followed the reasoning in *Zaihasri* and ruled that the fraud must be litigated at trial and not merely by way of an OS.

Other factors considered by this court

[40] There were other challenges launched by counsel for P&O. They included the issue of whether the solicitor of the plaintiff was competent to affirm the affidavit in support of this current application. This court does not find the affirmation to be flawed as the test is whether the deponent of the affidavit as provided under O 41 of the Rules of Court 2012 had knowledge of what transpired (see *Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan* [2003] 4 MLRH 816; [2003] 1 LNS 280 (HC)). Therefore, no consideration is given to this point and the preliminary objection is dismissed.

[41] Another point raised by counsel was the issue whether the failure by the plaintiff to outline what happened to the first suit filed in 2014 at the magistrates court which was withdrawn by the plaintiff and subsequently refiled and culminating in the order dated 22 May 2017 being obtained. There is no merit to this objection. If at all, it will provide some information but to allow such an objection would be remiss on the part of this court.

CONCLUSION

[42] Premised on the foregoing reasons, the OS is therefore dismissed with costs.

Application dismissed with costs.

Reported by Muhamad Azham Marwan